

EDMUND G. BROWN JR.
Attorney General of the State of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HEATHER BUSHMAN
Supervising Deputy Attorney General
LINNEA D. PIAZZA, State Bar No. 246868
Deputy Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2221
Fax: (619) 645-2581
Email: Linnea.Piazza@doj.ca.gov

Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MARK TITCH,

Petitioner,

v.

ROBERT HERNANDEZ, WARDEN,

Respondent.

08-CV-0654 J (Wmc)

**RESPONDENT'S REQUEST FOR
STAY PENDING ISSUANCE OF
THE MANDATE IN *HAYWARD***

Judge: The Honorable William
McCurine, Jr.

INTRODUCTION

Inmate Mark Titch filed a Petition for Writ of Habeas Corpus, contending that his due process rights were violated by the Board of Parole Hearings' 2006 decision finding him unsuitable for parole. The Court ordered a response to the Petition.^{1/} Should Respondent reach the merits, as a threshold jurisdictional issue, Respondent would assert that Petitioner has no federally protected liberty interest in parole, and thus, no basis for obtaining federal habeas relief

1. The Motion to Dismiss the Petition is due on June 9, 2008, and the Answer is due on June 24, 2008.

under 28 U.S.C. § 2254(a) (a federal Court may consider a state prisoner's petition "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"). On May 16, 2008, the Ninth Circuit granted en banc review in *Hayward v. Marshall*, 512 F.3d 536 (9th Cir. 2008), *reh'g en banc granted*, ___ F.3d ___, No. 06-55392 (9th Cir. filed May 16, 2008).^{2/} The en banc court in *Hayward* may decide whether this Court has jurisdiction over this case, and the appropriate standard to be applied if there is jurisdiction. Therefore, Respondent is requesting this Court to stay all further proceedings in this matter, including the filing of Respondent's Motion to Dismiss and Answer, until the mandate in *Hayward* is issued.

ARGUMENT

THE COURT SHOULD EXERCISE ITS DISCRETION AND STAY THIS MATTER PENDING ISSUANCE OF THE MANDATE IN *HAYWARD* BECAUSE BOTH THE BALANCE OF THE INTERESTS AND CONSIDERATIONS OF JUDICIAL ORDER AND ECONOMY FAVOR GRANTING A STAY.

A trial court has discretion to ensure the just and efficient determination of a case by staying it pending the resolution of other proceedings where a stay would be "efficient for [the court's] docket and the fairest course for the parties." *Leyva v. Certified Grocers of Cal.*, 593 F.2d 857, 863 (9th Cir. 1979). In determining whether to grant a stay, a court should consider the possible damage that may result, the hardship or inequity that a party may suffer, and the orderly course of justice, in terms of simplifying or complicating the issues, proof, and questions of law, that could result from the issuance of a stay. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109, 1111 (9th Cir. 2005). A court should also take into account the existence of similar cases that are pending in the same district court, and the probability that more are likely to be filed. *Id.* Staying cases that are on the forefront of an issue provides a necessary delay, allowing for resolution of the issues and resulting in uniform treatment of like suits. *Id.*

As the resolution of *Hayward* could significantly impact this case and numerous similar cases and issuing a stay would prevent unfairness and serve the interests of judicial economy, the

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2. Before the grant of the en banc rehearing, *Hayward* was published at 512 F.3d 536 (9th Cir. 2008). Argument will be heard on June 24, 2008.

1 Court should therefore exercise its discretion and stay this matter pending the issuance of the
2 mandate in *Hayward*.

3 **A. Moving Forward with this Case Before the Finality of *Hayward***
4 **Does Not Serve the Interest of Judicial Economy.**

5 Granting a stay in this case serves the interests of judicial order and economy. On May
6 16, 2008, the Ninth Circuit granted rehearing en banc in *Hayward*. (Ex. 1 - Order in *Hayward v.*
7 *Marshall*, no. 06-55392.) At issue before the en banc panel in *Hayward* are two threshold issues
8 which are necessary to the resolution of this case: 1) whether California has created a federally
9 protected liberty interest in parole for life inmates, and 2) if a liberty interest is created, what
10 process is due under clearly established Supreme Court authority. Resolution of these issues
11 could establish that Petitioner does not have a federally protected liberty interest in parole,
12 potentially allowing the Court to dismiss his claims for lack of jurisdiction without requiring
13 briefing from the parties. Even if *Hayward* holds that federal courts have jurisdiction, *Hayward*
14 may clarify the standard of judicial review, thus affecting the analysis applied to the merits of
15 Petitioner's case. Accordingly, it would be wasteful to proceed in this case without the Ninth
16 Circuit's holdings in these matters, as the parties would need to brief issues that will be decided
17 en banc and then submit supplemental briefing to apply the law as clarified in the en banc
18 decision. The two rounds of pleadings may unnecessarily complicate the matters raised and
19 would impair the orderly course of justice. Waiting for the resolution of *Hayward* would thus
20 conserve Court resources, and prevent the Court from having to revisit this matter if *Hayward* is
21 modified or reversed.

22 A stay would also serve judicial order and economy by maintaining uniform treatment of
23 like suits, as once the law is settled it can be uniformly applied. In many habeas petitions
24 challenging California parole decisions, the Ninth Circuit has sua sponte stayed submission of
25 the cases until the resolution of *Hayward*. See, e.g., *Tolliver v. Carey*, no. 07-15347; *Boatman v.*
26 *Brown*, no. 05-16199; *Smiley v. Hernandez*, no. 06-55727; *Valdivia v. Brown*, no. 08-15650;
27 *Johnson v. Newland*, no. 04-16712; *Varner v. Brown*, no. 05-16029; *Johnson v. Finn*, no. 06-
28 17042; *Clark v. Shepherd*, no. 06-55065; *Cooke v. Solis*, no. 06-15444. Granting a stay would

1 therefore conserve judicial resources and serve the Court's interest in orderly managing these
2 proceedings.

3 **B. A Stay Would Not Unfairly Delay Petitioner in Pursuing His Claims.**

4 A stay of this case at the district level would not unfairly impose any additional or
5 otherwise avoidable hardship on Petitioner. As discussed above, if the parties proceed in this
6 case additional briefing will likely be needed after the decision in *Hayward*, perhaps delaying
7 final resolution. Also, even if this court decides this case before *Hayward*, it is likely the losing
8 party will file an appeal, and that appeal may be delayed pending resolution of *Hayward*. (See
9 Arg. A.)

10 **CONCLUSION**

11 When the equities are balanced, the parties' interests and the interests of judicial economy
12 support staying this case pending the final resolution of *Hayward*. Staying this case until
13 challenges to *Hayward* are resolved and that decision becomes final promotes the orderly
14 resolution of this matter, and will assist in maintaining uniformity of like suits pending before
15 this Court and similar cases that will be filed in the future. Respondent therefore requests that
16 the Court exercise its discretion to stay this matter pending issuance of the mandate in *Hayward*.

17 Dated: June 2, 2008

18 Respectfully submitted,

19 EDMUND G. BROWN JR.
Attorney General of the State of California

20 DANE R. GILLETTE
Chief Assistant Attorney General

21 JULIE L. GARLAND
Senior Assistant Attorney General

22 HEATHER BUSHMAN
Supervising Deputy Attorney General

23 /s/ Linnea D. Piazza

24
25 LINNEA D. PIAZZA
26 Deputy Attorney General
27 Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Titch v. Hernandez**

No.: **08-CV-0654 J (Wmc)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 2, 2008, I served the attached **RESPONDENT'S REQUEST FOR STAY PENDING ISSUANCE OF THE MANDATE IN HAYWARD** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

MARK WAYNE TITCH
CDC # B-89549
RICHARD J. DONOVAN
CORRECTIONAL FACILITY AT ROCK
MOUNTAIN
480 ALTA ROAD
SAN DIEGO, CA 92179

IN PRO PER

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 2, 2008, at San Diego, California.

S. Banks

Declarant



Signature